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PUBLIC BANK BHD v. MAHACITY SDN BHD & ANOR

HIGH COURT MALAYA, IPOH
SM KOMATHY JC
[CIVIL APPEAL NO: 12BNCVC-12-02-2015]
5 APRIL 2016

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CIVIL PROCEDURE: *Third party proceedings – Indemnity – Third party notice for indemnity – Whether bank entitled to indemnity in absence of express or implied contract of indemnity – Nature of claim – Whether for damages for breach of contract or indemnity – Whether bank entitled to refund – Rules of Court 2012, O. 16 r. 8(1)*

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CONTRACT: *Indemnity – Scope of – Third party notice for indemnity – Whether bank entitled to indemnity in absence of express or implied contract of indemnity – Nature of claim – Whether for damages for breach of contract or indemnity – Whether bank entitled to refund*

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The plaintiff ('the hirer') entered into agreements with the first defendant ('the bank') and the second defendant ('the dealer') for the purchase of a Sumitomo model SH300 excavator. Subsequently, the hirer instituted an action against the bank and the dealer seeking the termination of the agreements and for the refund of all monies paid on the grounds that: (i) the excavator was not a Sumitomo model SH300; (ii) it was not manufactured in 2006 as represented; and (iii) the chassis number and engine number of the excavator was tampered with. The bank, thereupon, issued a third party notice against the dealer under O. 16 r. 8(1) of the Rules of Court 2012 ('ROC') for indemnity, in the event it was found liable to refund the monies to the hirer. The Sessions Court Judge allowed the plaintiff's claim against the bank and the dealer. However, the bank's claim under the third party proceedings was dismissed on the ground that there was no contract of indemnity by the dealer to indemnify the bank against any loss which it may suffer from the purchase of the excavator as required by s. 77 of the Contracts Act 1950. Hence, the bank appealed against the dismissal of its third party action. The issues that arose for the court's determination were: (i) whether the third party proceedings was for indemnity or for damages for breach of contract; (ii) if the answer was indemnity, was there an express or implied contract of indemnity by the dealer to indemnify the bank; and (iii) if the answer was damages, whether the bank was entitled to damages for breach of contract from the dealer.

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Held (allowing appeal with costs):

(1) A litigant who claims money from another person when he is being sued by a third party can, if he desires, describe the nature of his claim as a claim to indemnity, but that does not preclude the court from examining the true nature of his claim. (para 21)

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(2) The perusal of the third party notice and the statement of claim showed that the claim was for damages for breach of contract. Although the prayer for reliefs used the term indemnity, it did not indicate that the bank's claim was for indemnity under O. 16 r. 8(1)(a) of the ROC. The bank was seeking to recover damages for the breach committed by the dealer in selling to it a defective excavator. While the bank's measure of loss amounted to an indemnity from the dealer in respect of its liability to the hirer, the claim was one for damages for breach of contract. In describing the claim as an indemnity the bank did not intend it to be a claim for indemnity within O. 16 r. 8(1)(a) of the ROC. (paras 18-22)

(3) For a hire purchase transaction to be constituted, it is essential that the dealer must sell the vehicle to the financier to enable the financier to let out the vehicle on the purchase to the hirer. The dealer in selling the excavator to the bank was in breach of the sale contract and the bank was consequently entitled to a refund of the price. The dealer was in breach of the implied condition under s. 14(A) of the Sale of Goods Act 1957 that it had the right to sell the excavator. (paras 29 & 30)

Case(s) referred to:

Affin-ACF Finance Bhd v. Phang Ngan Heong [2010] 7 CLJ 592 HC ***(refd)***
Ahmad Ismail v. Malayan Motor Co & Anor [1972] 1 LNS 5 HC ***(refd)***
Birmingham and District Land Company v. London and North Western Railway Company [1887] 34 Ch D 267 ***(refd)***
Car and Universal Finance Co Ltd v. Caldwell [1964] 1 All ER 290 ***(refd)***
Inai Bina Sdn Bhd v. Mohd Rizzal Shamat (Trading as Kejuruteraan Perdana Teguh); Bintang Kencana Sdn Bhd (Third Party) [2015] 1 LNS 674 HC ***(refd)***
Lee Ah Lan v. Lee Kim Lan Construction Industries Sdn Bhd & Anor (No 3) [2003] 8 CLJ 228 HC ***(refd)***
Malayan Banking Bhd v. Sepakat Computer Consultant Sdn Bhd & Ors; Intercontinental Nominees Sdn Bhd & Anor (Third Parties) [2011] 1 LNS 843 HC ***(refd)***
Sime Darby Bhd & Ors v. Dato' Seri Ahmad Zubair @ Ahmad Zubir Hj Murshid & Ors And Tun Musa Hitam & Ors (Third Parties) [2012] MLJU 189 ***(refd)***
United Investment and Finance Ltd v. Walker & Anor [1966] 1 LNS 208 HC ***(refd)***

Legislation referred to:

Contracts Act 1950, ss. 77, 78
Rules of Court 2012, O. 16 r. 8(1)(a)
Sale of Goods Act 1957, s. 14(a)

For the appellant - HK Tan; M/s Sidek Teoh Wong & Dennis
For the 1st respondent - V Premshangar & Muralidharan Balan Pillai; M/s Lewis & Co
For the 2nd respondent - Marcia Geraldine Lopez; M/s The Chambers of Yu Shin Ong

Reported by S Barathi

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JUDGMENT

SM Komathy JC:

[1] The primary issue that arises in this appeal is whether the Sessions Court Judge was right in dismissing the first defendant's (the appellant here) third party action against the second defendant (the respondent here) under O. 16 r. 8(1) of the Rules of Court 2012 ("RHC").

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The Salient Facts

[2] The facts of this case are straightforward. The plaintiff approached the second defendant, a dealer, to purchase a Sumitomo excavator, model SH300. The dealer represented that the excavator in his shop was the latest imported Sumitomo model SH300 and that the year of make was 2006. The hirer paid a deposit of RM50,000 and obtained financing from the first defendant, a licensed financial institution for the balance purchase price.

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[3] By a hire purchase agreement dated 20 April 2011, the first defendant hired to the plaintiff the excavator. For ease of reference, I shall hereinafter refer to the plaintiff, first and second defendants as the hirer, bank and the dealer, respectively.

[4] In 2014, the hirer instituted an action against the bank and dealer seeking the termination of the agreements made with them, and for the refund of all monies paid, on three principal grounds: (a) the excavator was not a Sumitomo model SH300; (b) it was not manufactured in 2006 as represented; and (c) that the chassis number and engine number of the excavator was tampered with. The bank, thereupon, issued a third party notice against the dealer under O. 16 r. 8(1) for indemnity, in the event it was found liable to refund the monies to the hirer.

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[5] At the conclusion of the trial, after hearing submissions, the Sessions Court Judge allowed the plaintiff's claim against the bank and dealer, but dismissed the bank's claim under the third party proceedings. The bank has appealed against the dismissal of its third party action.

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Decision Of Court Below

[6] The Sessions Court Judge explained in her grounds of decision that the bank's third party action was dismissed as there was no contract of indemnity by the dealer to indemnify the bank against any loss which it may suffer from the purchase of the excavator as required by s. 77 of the Contracts Act 1950.

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Arguments On Appeal

[7] Mr HK Tan, on behalf of the bank, contended that the Sessions Court Judge had erred in holding that the third party proceedings was for indemnity, when in fact it was for damages for breach of contract in respect of the sale of the excavator. He relied on an invoice dated 17 March 2011 to show there was a contract of sale between the bank and the dealer. He argued that O. 16 r. 8(1), did not restrict the relief a defendant can seek from

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a co-defendant, to indemnity and contribution, but also allowed other relief, like damages for breach of contract, provided the relief was related to the hirer's claim against the defendants in the main action.

[8] In response, Miss Marcia Lopez for the dealer accepted that damages could be claimed under O. 16 r. 8(1), but disagreed that the third party proceedings in the instant case was for damages for breach of contract. She argued that the bank had consistently taken the position that the claim was for indemnity, and cannot now depart from its pleaded case and reformulate a new one. The Sessions Court Judge was correct therefore in holding that the claim was for indemnity only, and dismissing it in the absence of a express contract of indemnity. In the alternative, she contended even if the claim was for damages, it was bound to fail as there was no contract of sale between the bank and dealer.

The Issues On Appeal

[9] The submissions of the parties raise the following issues for determination:

(1) Whether the third party proceedings was for indemnity or for damages for breach of contract?;

(2) If the answer is indemnity, was there an express or implied contract of indemnity by the dealer to indemnify the bank?; and

(3) If the answer is damages, is the bank entitled to damages for breach of contract from the dealer?

Contract Of Indemnity

[10] Section 77 of the Contracts Act provides:

> A contract by which one party promises to save the other from loss caused to him by the conduct of the promisor himself, or by the conduct of any other person, is called a "contract of indemnity".

[11] Section 78 of the Contracts Act reads;

> The promisee in the contract of indemnity, acting within the scope of his authority, is entitled to recover from the promisor:
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> (a) all damages which he may be compelled to pay in any suit in respect of any matter to which the promise to indemnify applies;
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> (b) all costs which he may be compelled to pay in any such suit if, in bringing or defending it, he did not contravene the orders of the promisor, and acted as it would have been prudent for him to act in the absence of any contract of indemnity, or if the promisor authorised him to bring or defend the suit; and
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> (c) all sums which he may have paid under the terms of any compromise of any such suit, if the compromise was not contrary to the orders of the promisor, and was one which it would have

A been prudent for the promisee to make in the absence of any contract of indemnity, or if the promisor authorised him to compromise the suit.

[12] Sections 77 and 78 do not embody the whole law on the subject of the contracts of indemnity. The two sections only deal with one particular kind B of indemnity which arises from a promise made by the promisor to save the promisee from the loss caused to him by the conduct of the promisor or any other person. The law on contracts of indemnity is much wider that what is stated in these sections.

[13] This is evident from a slew of cases such as *Birmingham and District* C *Land Company v. London and North Western Railway Company* [1887] 34 Ch D 267, *Lee Ah Lan v. Lee Kim Lan Construction Industries Sdn Bhd & Anor (No 3)* [2003] 8 CLJ 228; [2003] 2 MLJ 514, *Sime Darby Bhd & Ors v. Dato' Seri Ahmad Zubair @ Ahmad Zubir bin Hj Murshid & Ors and Tun Musa Hitam & Ors (Third parties)* [2012] MLJU 189, *Inai Bina Sdn Bhd v. Mohd Rizzal* D *Shamat (Trading as Kejuruteraan Perdana Teguh); Bintang Kencana Sdn Bhd (Third Party)* [2015] 1 LNS 674; [2015] 11 MLJ 360, *Malayan Banking Bhd v. Sepakat Computer Consultant Sdn Bhd & Ors; (Intercontinental Nominees Sdn Bhd & Anor (Third Parties)* [2011] 1 LNS 843; [2011] MLJU 907 and *Affin-ACF Finance Bhd v. Phang Ngan Heong* [2010] 7 CLJ 592; [2010] 7 MLJ 561.

E **[14]** The following principles can be distilled from these authorities which I do not understand to be in dispute:

a) A right to indemnity may arise from contract-express or implied;

b) A right to indemnity is not confined to cases of contract. It exists where F the relation between the parties is such that either in law or in equity there is an obligation upon one party to indemnify the other. For eg, principal and agent, or employer and employee;

c) A right to indemnity may arise out of legal or equitable duty to indemnify whenever one man requests another man to do a thing for G him, and, in consequence of his doing that act, the person who does it is subject to some liability and subject to some loss, then, in consequence of the request to do the act, the law implies a contract by the requesting party to indemnify the person who does the act from the consequences of his doing it.

H d) A right to indemnity may arise out of statute to various kinds of contract;

e) A right to damages, is not a right to indemnity. It is the converse of such a right. A right to indemnity is given by the original bargain between the I parties. The right to damages is given in consequence of the breach of the original contract between the parties. It is an incident which the law attaches to the breach of a contract, and is not a provision of the contract itself; and

(f) To maintain a claim for indemnity, a party must not only plead that the other party was in breach of its contractual duty or its duty of care to him but also that the cause or causes of action for such indemnity, ie, whether founded on an express or implied contract or an implied indemnity arising from the relationship between the parties.

Third Party Proceedings Against A Co Defendant

[15] The right of a defendant to issue a third party notice to a co-defendant is set out in O. 16 r. 8 of the ROC, which provides:

(1) Where in any action a defendant who has entered an appearance:

(a) claims against a person who is already a party to the action any contribution or indemnity;

(b) claims against such a person any relief or remedy relating to or connected with the original subject matter of the action and substantially the same as some relief or remedy claimed by the plaintiff; or

(c) requires that any question or issue relating to or connected with the original subject matter of the action should be determined not only as between the plaintiff and himself but also as between either or both of them and some other person who is already a party to the action, then, subject to paragraph (2), the defendant may, without leave, issue and serve on that person a notice containing a statement of the nature and grounds of his claim or, as the case may be, of the question or issue required to be determined.

(2) Where a defendant makes such a claim as is mentioned in para. (1) and that claim could be made by him by counterclaim in the action, para. (1) shall not apply in relation to the claim.

[16] It is clear that in an action brought against several defendants, a defendant who wishes to make his co-defendant a third party in the action, may do so without any order having been obtained. Leave of the court is only required to issue a third party notice to a person who is not already a party to the action. Order 16 r. 8(1) permits a defendant to take advantage of the summary procedure provided therein to bring third party proceedings against his co-defendants for relief set out therein. This is designed to avoid multiplicity of actions and to facilitate the determination of all related issues in one set of proceedings.

[17] Having dealt with the law on indemnity and third party proceedings against a co-defendant, I now proceed to consider the issues raised by the parties.

A **Issue 1: Nature Of Bank's Claim In Third Party Proceedings**

[18] The first issue pertains to the nature of the claim made by the bank in the third party proceedings. Upon perusing the third party notice and the statement of claim, particularly paras. 7 to11 I find that the claim is for damages for breach of contract. The bank has expressly pleaded that the dealer was in breach of the contract of sale. Paragraphs 7 to 11 are in these terms:

> 7. Keseluruhan harga belian telah dibayar kepada pihak defendan kedua dan pada setiap masa yang material, pihak defendan kedua sedar dan mengetahui bahawa tujuan pembelian kenderaan tersebut oleh pihak defendan pertama adalah untuk menyewa belikannya kepada pihak plaintif.
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> 8. Berikutan daripada itu, pihak defendan pertama telah pun menyewa belikan kenderaan tersebut kepada pihak plaintif melalui perjanjian sewa beli tersebut.
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> 9. Menurut pihak plaintif dalam pernyataan tuntutannya, pada sekitar bulan Ogos 2013 pihak plaintif telah mendapati bahawa kenderaan tersebut bukanlah kenderaan seperti model, tahun dan/atau butir-butir yang direpresentasikan serta terdapat gangguan pada nombor chasis kenderaan tersebut.
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> 10. Di samping itu, pihak plaintif juga telah menyatakan bahawa pemeriksaan Puspakom pada 3.9.2013 juga mengesahkan bahawa terdapat gangguan pada nombor dan dsasr nombor chasis kenderaan tersebut.
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> 11. Oleh itu, pihak plaintif telah menyatakan bahawa pihak defendan pertama telah menyalah representasi dan menungkiri Perjanjian Sewa Beli tersebut dan pihak plaintif telah mengalami kerugian seperti yang dituntut dalam Pernyataan Tuntutan plaintif.

[19] However, in para. 19 of the same statement of claim, which is the prayer for reliefs, the bank uses the term indemnity. The material parts of this paragraph is in these terms:

> Oleh itu, pihak defendan pertama menuntut daripada pihak defendan kedua seperti yang berikut :
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> (i) Tanggungan rugi terhadap segala jumlah yang diberikan kepada pihak plaintif terhadap pihak defendan pertama;
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> (ii) Tanggungan rugi terhadap sebarang jumlah lain dan/atau tambahan yang diberikan kepada pihak plaintif terhadap pihak defendan pertama sama ada melalui jumlah tuntutan atau kos bersamaan kos pihak defendan pertama untuk membela tindakan pihak plaintif;
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> (iii) Jumlah ganti rugi boleh ramal dalam bentuk jumlah baki akaun sewa beli tersebut yang akan ditentukan kemudiannya; ....

[20] The use of the expression indemnity, does not in my view, indicate that the bank's claim is for indemnity under O. 16 r. 8(1)(a). The term indemnity is used in law in a variety of senses. In its widest sense, it means recompense for any loss or liability which a person has incurred, such duty arising from an agreement or otherwise.

[21] A litigant who claims money from another person when he is being sued by a third party can, if he desires, describe the nature of his claim as a claim to indemnity, but that does not preclude the court from examining the true nature of his claim. In this context, in paras. 7 to 11 of the statement of claim the bank is seeking to recover damages for the breach committed by the dealer in selling to it a defective excavator. It seeks an indemnity against the claim made against it by the hirer only in the sense that it provides it with funds from which, if it wishes, it may utilise it to meet that claim.

[22] While the bank's measure of loss in the present case may well amount to an indemnity from the dealer in respect of its liability to the hirer, the claim is one for damages for breach of contract. In describing the claim as an indemnity the bank did not intend it to be a claim for indemnity within the r. 8(1)(a).

[23] For the reasons stated, the Sessions Court Judge was wrong in construing the third party action as a claim for indemnity and dismissing it in the absence of a express contract of indemnity.

Issue 2: Right To Indemnity

[24] In view of my finding that the third party action was not for indemnity but damages for breach of contract, it becomes unnecessary to consider whether the bank is entitled to claim indemnity.

Issue 3: Whether Bank Entitled To Bring Claim Damages For Breach Of Contract

[25] Miss Lopez took the position that the claim for damages was misconceived as there was no contract of sale between the bank and dealer. It is difficult to fathom this argument as it is patently clear on the evidence that the excavator was sold to the bank, which then let it out to the hirer under the hire purchase agreement. Miss Lopez's argument that there was contractual relationship between the bank and dealer is contrary to case law on this matter.

[26] The following passage in the judgment of Winslow J on the nature of a hire purchase agreement in *United Investment and Finance Ltd v. Walker & Anor* [1966] 1 LNS 208; [1967] 1 MLJ 30, is instructive in this regard:

> It is usual in these cases to have a separate agreement of some kind or a document evidencing the fact that a sale of the goods had taken place as between the dealer and the financier so as to vest the property in the goods in the financier before it becomes the subject-matter of a hire purchase agreement.
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> ... all the requirements followed by the commercial community in matters of hire purchase have been followed save that there is no formal agreement in writing evidencing a sale from the dealer to the financier. It would appear from Goode on *Hire-Purchase Law and Practice* at page 376 that the sale to the financier is usually subject to the provisions of a master agreement between the financier and the dealer regulating the

A business connection between them. It does not seem that such an agreement is essential though it would seem to be highly desirable. It is a separate contract from the hire purchase agreement and regulates the business relationship between dealer and financier at its inception.

[27] The same view was echoed by Mohamad Azmi J, in *Ahmad Ismail v.* B *Malayan Motor & Anor* [1972] 1 LNS 5; [1973] 1 MLJ 117. His Lordship said:

... it is apparent that the intention of the parties in this case was that the car dealer should sell the car at $4,900 to the finance company who would then in turn sell it to the plaintiff on a hire purchase agreement at $5,820. C ... Once the car dealer had received the full purchase price of the Morris car, I do not think that it had any more interest in the matter since the ownership of the motor car would have been transferred from the car dealer to the finance company who in turn hired it to the plaintiff.

[28] In *Car and Universal Finance Co Ltd v. Caldwell* [1964] 1 All ER 290 D Wightman J expressed his judgment in the following terms:

No doubt car dealers are agents for some purpose of the finance companies with whom they deal in relation to transaction with the hirer ; but the basic transaction between car dealer and the finance company is one of sale and purchase

E So that if the dealers do sell a car with a defective title to the finance company, the latter will have its common law remedy in damages against the dealer.

[29] The foregoing authorities show that for a hire purchase transaction to be constituted, it is essential that the dealer must sell the vehicle to the F financier to enable the financier to let out the vehicle on the purchase to the hirer. It cannot be gainsaid that the invoice dated 17 March 2011, is a document evidencing the sale of the excavator by the dealer to the bank, and the bank then let it out to the hirer on hire purchase.

[30] The dealer in selling the excavator to the bank was in breach of the G sale contract and the bank is consequently entitled to a refund of the price amounting to RM135,600. The dealer was in breach of the implied condition under s. 14(a) of the Sale of Goods Act 1957 that it had the right to sell the excavator.

Conclusion

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[31] For the reasons stated, the bank is entitled to the refund of the monies it had paid the dealer.

[32] I allow the appeal with costs of RM10,000. It was not in dispute that the excavator is still in the possession of the bank. The bank agreed to take I steps to auction the excavator and then claim for any shortfall from the dealer.